Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06587/2019

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 3rd February 2020	**On 5th February 2020**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Raja Muhammad Nadeem Raza
(no anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Biggs, Counsel instructed by Vision Solicitors Ltd
For the Respondent : Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on the 15th December 1985. He appeals with permission the decision of the First-tier Tribunal (Judges Kelly and Moxon) to dismiss his human rights appeal.

2. This appeal primarily concerns the Appellant's assertion that he qualifies for indefinite leave to remain under paragraph 276B of the Immigration Rules on

the grounds that he has now accrued ten years' continuous lawful residence. If he so qualifies, then it would follow that the appeal would be allowed on human rights grounds, since there would be no public interest in refusing to grant leave.

3. The matter in issue before the First-tier Tribunal was not whether the Appellant had lived in this country for the requisite amount of time: it is accepted that he has lived here since November 2008 when he was given leave to enter as a Tier 4 (General) Student Migrant. The question was whether he had accrued ten years *lawful* continuous residence; that is to say whether there were any gaps in the leave held by the Appellant during that time.

4. The Secretary of State had refused to grant indefinite leave to remain under paragraph 276B on the grounds that there was a period, between the 9th November 2010 and the 7th March 2011, when the Appellant was without leave. It was this 'gap' in residence which was the focus of the hearing before the First-tier Tribunal.

5. The Appellant's witness statement of the 12th July 2019 sets out his case as it was put to the First-tier Tribunal. He explains that he was a student at the time when he had applied for his Tier 4 visa to be renewed. It was refused and he engaged the services of someone whom he believed to be a solicitor. That lady attended his appeal hearing, before First-tier Tribunal Judge Ince, and the appeal was allowed. Judge Ince's decision is dated the 2nd July 2010. The Appellant then waited for the Secretary of State to issue him with further leave to remain, as might be expected after a successful appeal. The Appellant states that he then heard nothing. Weeks came and went. The Appellant went to see his representative sometime in August 2010, only to find that the firm had been closed down. He managed to track his 'solicitor' down, to another firm, and she told him that she had not heard from the Home Office. For reasons which are unclear, the Appellant got fed up waiting and decided to make another application, lodged in February 2011. This application was successful, and the Appellant was subsequently granted leave.

6. The Secretary of State contested this case. The Home Office record shows that on the 9th August 2010 the Home Office actioned the decision of Judge Ince and granted the Appellant further leave to remain, valid until the 9th November 2010. The record indicates that the grant of further leave was sent by recorded delivery to 'reps address Commercial House'. The records further show that the Appellant's representatives then chased the Home Office for a decision; they sent in passports and asked them to be endorsed. The Home Office, apparently accepting that the original letter had not reached the Appellant, recorded that they sent a further copy of the grant, alongside the endorsed passports, to the Appellant's new representative on the 26th October 2010. It was therefore the Respondent's position that the Appellant knew full well that he had been granted further leave, that he let that leave lapse and that there was therefore a gap between the 9th November 2010 and the 7th March 2011 when the next visa was issued.

7. The factual dispute before the First-tier Tribunal therefore crystallised into this: had there been good service of the 2010 grant of further leave? The legal relevance of that question is not clearly articulated in the First-tier Tribunal decision but before me Mr Biggs explained the Appellant's argument as follows. The effect of Judge Ince's decision of the 2nd July 2010 was that the decision on whether to vary the Appellant's leave so as to extend it remained outstanding – the application in effect reverted back to the Home Office. Until a decision on that outstanding application was reached, and formally served, the Appellant's leave was statutorily extended by virtue of section 3C(2)(a) of the Immigration Act 1971. This means that when the Appellant made his further application in February 2011 this was in effect a variation of the outstanding application: s3C(5) applied. It being accepted that the Appellant held continuous lawful leave from that day on, his case on 276B rests.

8. How then did the First-tier Tribunal deal with that issue of fact at the heart of the appeal? At paragraph 8 it directs itself that the burden of proof is on the Appellant. At paragraph 15 it specifies: "the Appellant has failed to show upon the balance of probabilities that he was unaware of his leave having expired in November 2010". By way of explanation as to why the Appellant had failed to discharge that burden the Tribunal makes reference to, and draws adverse inference from, his *prima facie* discrepant claim that he has "no ties" to Pakistan with the fact that he in fact has a wife living there in a family home.

9. I allow this appeal for one reason. That is that in so directing itself the Tribunal failed to apply the correct burden of proof. In Syed (curtailment of leave – notice) [2013] UKUT 00144 IAC) the Tribunal held that the burden lies not on applicant to prove a negative ie prove that he did not receive notice, but rather it is on the Secretary of State to prove the positive case, ie that he did:

> *"the Secretary of State has to be able to prove that notice of such a decision was communicated to the person concerned, in order for it to be effective. Communication will be effective if made to a person authorised to receive it on that person's behalf: see Hosier v Goodall [1962] 1 All E.R. 30; but the Secretary of State cannot rely upon deemed postal service".*

10. It follows that any assessment made by the Tribunal of the totality of the evidence was based on a misapprehension of where the burden lay, and I cannot be satisfied that the decision would have been the same but for that error of law.

11. Mr Biggs sought to persuade me that having reached that decision I could simply allow the appeal without further ado. I do not agree. The factual dispute, and the legal consequences that may from it, are now a matter that is most appropriately reconsidered by the First-tier Tribunal. It is not simply a matter of looking at the Home Office GCID case-notes. As Mr Biggs himself stressed, it requires a holistic assessment of the evidence. The Appellant's own evidence about, for instance, why he decided to make a further

application (or variation) in February 2011 will also be relevant, given the Respondent's assertion that there was good service.

12. I therefore remit the matter to the First-tier Tribunal for remaking *de novo*.

Decision

13. The decision of the First-tier Tribunal has been set aside for error of law.

14. The decision in the appeal will be remade in the First-tier Tribunal

15. There is no order for anonymity.

Upper Tribunal Judge Bruce
3rd
February 2020